

In The

**Supreme Court of the United States**

Supreme Court, U. S.  
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October Term, 1977

No. 77-535

KENIL K. GOSS,  
*Plaintiff-Petitioner Pro Se,*

-against-

REVLON, INC. and Its Wholly Owned Subsidiary, USV  
PHARMACEUTICAL CORPORATION,  
*Defendants-Respondents.*

*On Petition for Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit.*

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**RESPONDENTS' BRIEF IN OPPOSITION**

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**OPINIONS BELOW**

In *Kenil K. Goss v. Revlon, Inc.*, 548 F.2d 405, decided October 29, 1976, the Second Circuit, in a per curiam opinion, decided an appeal by petitioner from an order of the U.S. District Court for the Southern District of New York (Honorable Richard Owen) granting respondent's cross-motion to dismiss petitioner's complaint which alleged employment discrimination under the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 e. *et seq.* The order granting respondent's cross-motion to dismiss petitioner's complaint was affirmed by the Second

Circuit. Petitioner had also moved in the district court for leave to amend his complaint to add new causes of action, under the Civil Rights Act of 1866, the Civil Rights Act of 1870, the Age Discrimination in Employment Act, the Thirteenth Amendment and sought class action status. The Second Circuit held that the district court failed to rule on petitioner's motion for leave to amend to add new causes of action. The case was remanded to the district court for a determination of petitioner's motion, only with respect to the cause of action under the Civil Rights Act of 1886, 42 U.S.C. §1981, since the Court held the other claims to be without merit. Petitioner thereafter petitioned the Second Circuit for rehearing and that petition was denied on December 20, 1976.

Upon remand, the United States District Court for the Southern District of New York (Honorable Richard Owen) denied, *nunc pro tunc*, petitioner's motion for leave to amend to assert a claim under 42 U.S.C. §1981.

Petitioner appealed once again. In *Kenil K. Goss v. Revlon, Inc.*, Docket No. 76-7614, decided April 29, 1977, the Second Circuit affirmed the order of the district court denying petitioner leave to amend to add a cause of action under 42 U.S.C. §1981. The Second Circuit found "no abuse of discretion in the district court's denial of leave to amend."

A petition for rehearing was denied by the Second Circuit on June 7, 1977.

In both decisions of the Second Circuit (Petitioner's Appendix A and B), the Court referred to the petitioner's "extended and undue delay" and petitioner's "long delay" in seeking to amend his complaint. A brief summary of the facts herein confirms that the Second Circuit's findings were correct. The facts presented by petitioner herein are misstated and without support in the record.

## STATEMENT

The summons and complaint were served on respondents on or about December 18, 1973. On or about January 7, 1974, respondents, by their attorneys answered the complaint. Respondents served a notice of oral deposition to commence on February 4, 1974.

On May 30, 1974, respondents filed a motion to compel petitioner to produce for inspection a certain 63 page statement referred to in his complaint and theretofore submitted by him to the Equal Employment Opportunity Commission (EEOC). Petitioner did not produce that 63 page statement until October 7, 1974, pursuant to direction of the court.

On October 9, 1974, respondents served a request for production of certain documents which were mentioned in the aforesaid 63 page statement. Petitioner refused to produce such documents.

On November 11, 1974 respondents moved to compel production of such documents. On December 6, 1974, the magistrate, to whom said motion was referred, rendered a report recommending that petitioner be directed to make available photocopies of the requested documents within 30 days. Petitioner failed and refused to comply with the district court order confirming said recommendation.

On April 18, 1975, respondents moved to dismiss the complaint because of petitioner's failure to comply with the court order directing production. The district court conditionally granted said motion to dismiss unless petitioner produced the documents within 10 days. The district court awarded costs in the sum of \$50 to respondents. This is the "arbitrary and excessive fine" to which petitioner continually refers. Petitioner finally produced the requested documents on June 11, 1975.



It is clear that any delay was caused by petitioner himself who determined that he would not voluntarily comply with discovery procedures. In fact, petitioner never complied because, on November 7, 1975, during the argument of the motion for summary judgment, petitioner referred to certain "secret documents" in his possession. The district court ordered petitioner to deliver such documents to respondents' attorneys. Accordingly, petitioner delayed for almost two years before producing documents which he admittedly removed from respondents' offices without authorization while still employed.

Petitioner contends that he first became aware of his rights under the Civil Rights Act of 1866 on March 29, 1974. However, petitioner did not submit his proposed amended complaint until September 22, 1975, almost 1½ years later.

Petitioner is not the ordinary pro se plaintiff without benefit of legal training. In his statement to EEOC, petitioner set forth the following credentials: Bachelor of Commerce (B.Com.), Master of Arts (M.A.) and Bachelor of Laws (LLB) from Calcutta University. He is also a New York State C.P.A., is studying for a Master of Business Administration (M.B.A.) at New York University and is an applicant for the Bar Examination in New York State and for the Master of Law (L.L.M.) Program at New York University.

Although petitioner continuously characterizes himself as a non-English speaking alien and a non-lawyer without benefit of legal counsel, it is clear that petitioner has extensive legal training, that he has received a law degree and that he is an applicant for a post graduate law degree program and for the Bar Examination of New York State.

Petitioner's academic and educational credentials belie his claims of ignorance. The record clearly establishes that petitioner himself was responsible for the extended and undue delay which was found by the Second Circuit in both prior decisions.

## ARGUMENT

### I.

#### The petition for writ of certiorari is untimely.

With regard to the first appeal upon which judgment was rendered on October 29, 1976 (Petitioner's Appendix A), the petition for certiorari is clearly untimely. Rehearing with respect to that appeal was denied on December 20, 1976 (Petitioner's Appendix C). Thus, pursuant to 28 U.S.C. §2101(c) the writ of certiorari had to be sought within 90 days after entry of such judgment or decree. The petition had to be filed no later than March 20, 1977. No extension of that filing deadline was sought or obtained. Such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the Court to entertain the petition, *Department of Banking v. Pink*, 317 U.S. 264 (1942). Accordingly, this court is without jurisdiction to entertain the petition to the extent that it refers to petitioner's original complaint under Title VII, the dismissal of which was affirmed by the Second Circuit.

With regard to the second appeal upon which judgment was rendered on April 29, 1977 (Petitioner's Appendix B), the petition for certiorari is also untimely. Rehearing with respect to that appeal was denied on June 7, 1977 (Petitioner's Appendix D). The writ of certiorari had to be sought within 90 days after entry of such judgment — no later than September 7, 1977. On July 7, 1977, petitioner submitted a certain document petitioning for a writ of certiorari. On October 7, 1977, respondents received another petition for a writ of certiorari which had been filed 30 days after the deadline. The second petition is substantially different from the original document filed by petitioner in July of 1977. Under these circumstances, the petition for certiorari is untimely.

## II.

**There is no issue warranting review on certiorari.**

With respect to the first appeal upon which judgment was rendered on October 29, 1976 (Petitioner's Appendix A), there is no issue warranting review on certiorari.

Both the district court and the Second Circuit found that the petitioner's employment was terminated on March 7, 1972 and that he did not file charges with EEOC until March 20, 1973, more than six months after the expiration of the 180 day period of limitations provided for by statute, 42 U.S.C. §2000 e-5(e) (Petitioner's Appendix A, page A-3). Petitioner failed to show any extenuating circumstances to excuse his untimely filing although he was provided with such opportunity by the district court.

With respect to the second appeal upon which judgment was rendered on April 29, 1977 (Petitioner's Appendix B), there is no issue warranting review on certiorari.

The only issue which was determined by the Second Circuit involved the denial by the district court of petitioner's motion for leave to amend his complaint to add a cause of action under 42 U.S.C. §1981. The Second Circuit ruled that, under the circumstances, including petitioner's long delay in seeking to file his amended complaint, there was no abuse of discretion in the district court's denial of leave to amend. Accordingly, the Second Circuit merely affirmed the exercise of the district court's discretionary power to deny leave to amend.

Petitioner incorrectly asserts that the decision herein is in conflict with the decisions of other circuits or is contrary to any decision of this court. Furthermore, there is no important question of constitutional or federal law requiring review by this court. There is merely a factual finding of undue delay which

warrants the exercise of discretion to deny leave to amend. All of the cases cited by petitioner recognize that refusal to permit amendment is not subject to review except for abuse of discretion and that undue delay is one of the accepted reasons for denying leave to amend.

## III.

**There is no conflict with the decisions of this Court.**

Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, allowance of amendments lies in the discretion of the district court and the refusal to permit amendment is not subject to review on appeal except for abuse of discretion; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

As stated in 3 *Moore's Federal Practice*, 15.08(4), pages 896-900, "the more common reasons for denying leave to amend are that the amendment \* \* \* is unduly delayed, is not offered in good faith, or that the party has had sufficient opportunity to state a claim and has failed."

## IV.

**There is no conflict among the circuits.**

The present decision is fully in accord with the other circuit decisions in which the same issue was presented.

In *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973), plaintiffs, who had brought a timely action under Title VII alleging employment discrimination, were denied leave to amend to add a cause of action for employment discrimination under the Civil Rights Act of 1866, 42 U.S.C. §1981. Plaintiffs sought leave on the grounds that they had become aware of the possibilities of Section 1981 only after filing the complaint. The court upheld the denial of leave as an entirely proper exercise of discretion, *Id.* at pp. 874-875.



In *Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), the district court denied plaintiff's motion to amend its pleadings to set forth an alternate theory of recovery based upon a modification of a license agreement. The only excuse offered for the delayed amendment was that plaintiff misconceived the law. The court held that it was not an abuse of discretion to deny the motion for leave to amend, since the case had been pending for more than 2½ years and no reason was shown why plaintiff could not have presented its alternative theory initially, *Id.* p. 971.

Petitioner contends that the district court abused its discretion by failing to state the reasons for its denial of his motion for leave to amend. In *Komie v. Buehler Corporation*, 449 F.2d 644 (9th Cir. 1971), the court held that the district court is not required to expressly state the reasons for denying the motion to amend, especially where the justifying reasons are readily apparent.

In the present case, petitioner instituted an action alleging employment discrimination under Title VII in December of 1973. In September of 1975 (almost two years later) he submitted a proposed amended complaint seeking to add several new causes of action, including class action status, and actions under the Age Discrimination in Employment Act, the Civil Rights Act of 1866 and 1870 and the Thirteenth Amendment. Petitioner offered no excuse for the delay. The reasons justifying denial of leave to amend were readily apparent.

V.

**There is no constitutional question.**

The issue in the present case relates solely to the affirmance by the Second Circuit of a finding of undue delay in seeking to file an amended complaint which warranted the exercise of discretion by the district court in denying leave to amend. No

amount of rhetoric or passionate prose can convert this matter into one which warrants review on certiorari. This matter does not raise questions of access to the federal courts by victims of employment discrimination, as petitioner asserts. It merely confirms the well-established law that denial of leave to amend a complaint is discretionary and that such discretion need not be exercised in favor of one who has deliberately delayed without any excuse.

Since December of 1973, petitioner has made innumerable motions, and has filed in the Circuit Court two appeals and two petitions for rehearing, all of which have been without merit. He has abused his status as a pro se litigant in order to use his petition to malign the trial judge, the attorneys for respondents and every person who has opposed his groundless claim. Accordingly, this Court should finally end this litigation by denying certiorari.

### CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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